Petition

81-672

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No. 81-

In the Supreme Court of the United States

October Term, 1981

JAMES A. IRWIN, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the Tenth Circuit misapply *Dunn v. United States* since the alleged falsity of the claims was inadequate as a matter of law to support the convictions and the only other basis for characterizing the claims as "false" was not alleged in the indictment or otherwise considered by the jury?

(2) Are "materiality" and "willfulness" essential elements of § 287?

(3) Was the evidence sufficient to support the only § 1001 conviction not overturned on appeal?

THE PARTIES BELOW

The Appellant in the Court of Appeals, who is the Petitioner before the Court, is James A. Irwin, Jr. The Appellee in the Court of Appeals, who is also the Respondent herein, is the United States of America. The United States initiated this action in the District Court with return of a criminal indictment against the Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") entered in this case on April 2, 1981.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported officially at 654 F.2d 671 (10th Cir. 1981) and is included in Appendix A.

JURISDICTION

The judgment of the Tenth Circuit was entered on April 2, 1981. A timely petition for rehearing was denied on August 17, 1981, and this petition for certiorari was filed within sixty days of that date pursuant to Rules 20.1 and 20.4 of this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The contents of 18 U.S.C. §§ 287 and 1001 are set forth in Appendix C hereto.

STATEMENT OF THE CASE

On or about March 22, 1978, the Petitioner, James A. Irwin, Jr., was indicted and charged with eight federal criminal offenses by the Grand Jury for the District of Colorado. The eight offenses charged consisted of one count of conspiracy (18 U.S.C. § 371 – Count One), four "false statement" counts (18 U.S.C. § 1001 – Counts Two, Three, Five and Seven) and three "false claim" counts (18 U.S.C. § 287 – Counts Four, Six and Eight). These latter statutes are referred to hereinafter as § 1001 and § 287 respectively.

The Petitioner was arraigned on these charges and trial commenced to a jury of twelve on June 27, 1978. A guilty verdict was returned on June 30, 1978, on each count. On July 7, 1978, the Petitioner filed a motion for judgment of acquittal and a motion for a new trial. These were heard and denied on August 29, 1978. On September 1, 1978, the Petitioner was sentenced.

Thereafter the Petitioner appealed his convictions to the Tenth Circuit Court of Appeals. On April 2, 1981, the Tenth Circuit set aside his § 1001 convictions (on Counts 1, 3, 5 and 7) and remanded for dismissal of Counts 3, 5 and 7 and for a new trial on Count 1. The convictions on Counts 2, 4, 6 and 8 were affirmed.

A Petition for Rehearing with Suggestion for Rehearing *En Banc* to review the four affirmed convictions was filed and the Tenth Circuit entered an Order on Rehearing August 17, 1981, denying the rehearing petition (see Appendix A).

During all of the relevant periods the Petitioner owned and operated a management consulting firm called Management Services located near Delta, Colorado. The company provided engineering, design and architectural services to local businesses.

In early 1974 the City of Delta through its City Council became interested in developing an industrial park. It hired the Petitioner on a part-time basis to review the feasibility of such development and to ascertain if federal financial assistance was available. In October 1974 a federal grant application was submitted to the Economic Development Administration (E.D.A.) on behalf of Delta to secure funding for the project. The Petitioner assembled the application for Delta following a series of meetings and other preliminary work.

The services provided to Delta by the Petitioner continued through the early part of 1975. The services involved in attempting to secure a federal grant for Delta included application preparation work, considerable travel, meetings with various government officials and other similar efforts. Between September 4, 1974 and April 1, 1975, the Petitioner submitted three bills to Delta for all of his work: 9/4/74 ($9,404.38); 1/2/75 ($8,001.36) and 4/1/75 ($3,514.67).

After submission to Delta of the third bill the City Council hired the Petitioner (in April 1975) to be the Delta City Manager on a part-time basis. This took place shortly after the E.D.A. gave final grant approval to the Delta industrial park grant application (on March 19, 1975).

At about the same time the Delta City Council hired A & S Consultants, Inc. (A&S), a company owned and operated by Robert Adams, to be the engineer for the industrial park project. This company was a competitor of the Petitioner's. The Petitioner and Robert Adams had anticipated the awarding of the engineering work to Adams' company during a meeting in August 1974. At that time it was agreed that if A & S got the job following grant approval, the Petitioner would provide nontechnical engineering services on the industrial park project to A & S and Adams would pay him a flat fee of $18,000 for the same.

The first three bills submitted to Delta by Adams as the project engineer were on August 7, September 1 and October 8, 1975. The bills each included "basic" engineering fees and "line item" (extra) engineering fees. The line items on the first three bills were $8,000, $6,100 and $2,500 and upon receipt of payment Adams immediately paid the same amounts to the Petitioner. Once two additional $900 payments were made (Jan. 15 and May 24, 1976), the agreed-upon $18,000 fee was met.

On the three bills submitted by Adams to Delta there was no indication that the "line items" sought reimbursement for services rendered by Irwin or that payment would be made by Adams to the Petitioner of the funds paid to him by the government.

The prosecution's entire case (except as to Count 2) dealt with the nondisclosure on each of the three bills of

the fact that the Petitioner had supplied part or all of the services for which payment was requested and that the claimed amounts would be paid to the Petitioner by Adams. The prosecution alleged that this nondisclosure made the *statements* false with respect to the § 1001 counts while it made the *claims* false for § 287 purposes. Each of the three bills results in companion charges of a false statement under § 1001 and a false claim under § 287 and therefore the falsity alleged for each was essentially the same.

The entire defense consisted of admitting the Government's case but arguing that no offense had been committed based upon such case. For example, each of the § 287 counts provided that the claim was false because "a substantial part of the work so claimed did not consist of engineering services performed by A & S." No defense witness disputed this and in fact it was freely admitted that a good portion of the services were performed by the Petitioner and not A & S. In addition, several witnesses (including Government witnesses on cross-examination) testified that a project engineer (such as A & S) could subcontract out engineering work without the need to disclose the same on its bills. Whatever arrangements a project engineer makes with subcontractors is irrelevant in part because E.D.A. differs from other federal agencies in that it makes grants to applicants (who in turn deal with contractors) rather than dealing directly with contractors itself.

The Tenth Circuit agreed with the Petitioner's main contention that there was no disclosure duty regarding work performed by subcontractors. It reversed the § 1001 convictions and held:

> We must agree that it was not shown that there was a legal duty to disclose in A & S's bills to Delta the payments made by A & S to MSC [Petitioner's management consulting firm] or the matters in-

> volved. Consequently, the convictions on Counts 3, 5 and 7 cannot stand.

On the § 287 convictions it said almost the same thing:

> We must agree with the defendant that the proof is insufficient to establish that A & S's bills were false, fictitious or fraudulent because of the failure to itemize and identify on the bills work performed by subcontractors.

Although not specifically stated it is clear that the Tenth Circuit again meant that there was a failure to establish that a disclosure duty had been violated by the failure to identify the Petitioner's involvement on the bills submitted.

Despite reaching the same legal conclusion on the *allegations* in the § 287 charges as it had on the § 1001 charges, the Tenth Circuit did not reverse the § 287 convictions because it found that there was other evidence "tending to show" that the $18,000 was a kickback or a partial kickback and that full services had not been performed for the line items. The Tenth Circuit used this "tending to show" language both in its initial opinion and in its rehearing-denial order and in so doing effectively acknowledged that there was only a minimal focus placed on this "kickback" theory. The citations to the record made by the Tenth Circuit in its rehearing order to show notice of and evidence concerning the kickback theory also demonstrate how little attention was given this theory during trial since no reference is made to the indictment, any trial testimony or the instructions.

To the extent that there was limited circumstantial evidence from which a jury could conceivably have found a kickback, such evidence paled by comparison to the amount of government evidence directed at proving the § 287 allegations that the line items didn't represent services "provided entirely by A & S," which fact was never con-

tested by the Petitioner or Adams. The Tenth Circuit said that the Petitioner's substantial rights were not violated by looking to see if there was sufficient proof of a different falsity even though such falsity was never alleged and therefore could not have been considered by the jury.

In addition to the foregoing, the Tenth Circuit held that for § 287 purposes "materiality" and "willfulness" need not be proved.

REASONS FOR GRANTING THE WRIT

The Court Below Decided Important Issues of Law in Ways Inconsistent with other Circuit Court Decisions and Inconsistent with Decisions of This Court.

The Tenth Circuit did not correctly apply *Dunn v. United States,* 442 U.S. 100 (1979). In *Dunn* this Court reversed the Tenth Circuit because it had failed to recognize that "to uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." The unfairness is compounded where (as here) the alleged falsity" underlying the convictions involved perfectly innocent conduct and where materiality and willfulness were not required to be proved. The Petitioner urges this Court to take the same action it took in *Dunn.*

Several Circuits are in conflict over the issues of whether willfulness and/or materiality must be proved in § 287 prosecutions. The facts of this case illustrate dramatically why the Tenth Circuit's position on these issues should be overturned by this Court.

A. The Tenth Circuit Did Not Correctly Apply *Dunn v. United States.*

The indictment with respect to Counts 4, 6 and 8 stated in pertinent part that:

> On or about . . . James A. Irwin, Jr., did present and cause to be presented to the Economic Development Administration, Department of Commerce of the United States, for payment, a claim against the United States for the performance of engineering services by A & S Consultants, Inc., in connection with a federal assistance grant for the East Delta Industrial Park, and he then knew the claim to be false, fictitious and fraudulent *in that a substantial part of the work so claimed did not consist of engineering services performed by A & S Consultants, Inc.* (emphasis added).

The theory presented by the government throughout the trial was that the Petitioner had violated §287 because a portion of the work billed to E.D.A. did not consist of *engineering* services performed by *A & S Consultants*. Even if a jury *could* reasonably conclude that services billed had not been performed at all, there was no government allegation to that effect in the indictment or instructions and very little evidence of the same.

Despite this the Tenth Circuit said that there was evidence "tending to show" that the claims were false because work hadn't been performed for part or all of the amounts claimed on the bills (the previously-referenced kickback theory). It also held:

> Admittedly, the indictment does not specifically allege that the claims were false [because A & S billed for services which were not performed]. Nevertheless, we think that if any variance exists between the evidence and the allegations in the indictment, it clearly has not affected Defendant's substantial rights.

As this Court recognized in *Dunn v. United States*, 442 U.S. 100 (1979), "to uphold a conviction on a charge that was neither alleged in the indictment nor presented to the jury at trial offends the most basic notions of due pro-

cess. Few constitutional principles are more fairly established than the Defendant's right to be heard on the specific charges of which he is accused."

In this case even though there was arguably some evidence of a kickback, the *Dunn* rule applies because such charge was neither (1) made in the indictment nor (2) otherwise presented to the jury (e.g., in the instructions) as *Dunn* requires. It is possible that a jury could have convicted the Petitioner if he had been charged under the kickback theory. However, there is no way of knowing what a jury would have done had such charge been presented to it and to speculate on how a jury would have acted is to deprive a defendant of his day in court.

The key in *Dunn* is the statement that a conviction could not be upheld on "a *charge* that was neither *alleged* in an indictment nor *presented* to a jury at trial" (emphasis added). The Tenth Circuit misread this to mean that if there was sufficient *evidence presented* at trial on another theory (albeit not charged in the indictment or referred to in the instructions) the conviction could be upheld. This Court did not intend the language to be so understood. Rather it requires that the theory on which a conviction is based be contained in the *charges* (whether set forth in the indictment or the instructions). The theory must be contained in one of those two places or else the jury will never consider the same. Stated differently, it is not enough for *evidence* to be "presented" but rather the *charges* must be "presented" to the jury.

The foregoing construction is also clear from *Chiarella v. United States,* 445 U.S. 222 (1980). In that case this Court held that the defendant owed no disclosure duty toward certain sellers and, hence, could not be convicted of nondisclosure under Rule 10b-5. The Government argued that there was an alternative duty owed another en-

tity which duty was breached by the defendant and while the *evidence* arguably supported the same, this Court would not consider the theory urged by the Government in support of the conviction because it had never been presented in the indictment or in the instructions or charges to the jury.

This issue is simple. Do *Dunn* and *Chiarella* only require proof or trial evidence as the Tenth Circuit implicitly maintains or do they require that the theory be brought to the jury's attention in either the indictment or instructions? Clearly they require the latter so that the concept of trial by jury is given meaning and the principles of due process are not violated.

Speculation on a jury verdict is particularly suspect in a case such as this where the *charged* falsity was not disputed, especially since falsity is the gravamen of the offense and no other acts are required to establish a §287 offense. The problem is compounded where the evidence of the *uncharged* falsity relied upon by the Tenth Circuit in upholding the conviction was weak at best and where (as noted *infra*) materiality and specific intent were not required to be proved.

In *Dunn* this Court reversed the Tenth Circuit because it had upheld a conviction on a basis different from that considered by the jury. This is exactly the situation presented here. The jury only *considered* whether A & S provided all of the services, which as a matter of law was inadequate to sustain a conviction, and did not *consider* the kickback theory.

Even if the jury here had been charged to find the Petitioner guilty if they found *either* the theory charged *or* the kickback theory, we would still be unable to determine whether their verdict had been based on the inadequate

theory. But here they weren't even given such choice. As a result there exists the exact prejudicial discrepancy decried in *Dunn* between the basis upon which the jury based its verdict and the basis upon which the Tenth Circuit rendered its opinion.

B. The Majority of Circuits Support the Better-Reasoned Position Requiring Pleading and Proof of Materiality and Willfulness as Essential Elements in § 287 Prosecutions.

A good portion of the defendant's evidence in this case was directed at establishing that if the alleged nondisclosure made the claims or statements false, this nondisclosure could not have had any effect or made any difference to anyone. The defense evidence was uncontroverted that nothing different would have taken place if disclosure had been made. Without question none of the claims was materially false in the foregoing sense.

Nevertheless, the Tenth Circuit held that materiality need not be proved. In connection with this materiality issue several Circuits have disagreed with the Tenth Circuit's conclusions. *United States v. Adler,* 623 F.2d 1287, 1291 n.5 (8th Cir. 1980); *United States v. Snider,* 502 F.2d 645, 652 n.12 (4th Cir. 1974); *United States v. Johnson,* 284 F. Supp. 273, 283 (W. D. Mo. 1968), *aff'd,* 410 F.2d 38 (8th Cir. 1969), *cert. denied,* 396 U.S. 822 (1969); *see also United States v. Haynie,* 568 F.2d 1091, 1092 (5th Cir. 1978) (*per curiam*).

It is the Petitioner's position that this Court should resolve the conflict in the Circuits and read into § 287 a materiality requirement. This is exactly what was done judicially with respect to the second clause of § 1001. *United States v. Beer,* 518 F.2d 168, 170-71 (5th Cir. 1975) ("In order to exclude 'trival' falsehoods from the purview of the statute, the courts have read a requirement

of materiality into its second clause. . . ."); *Gonzales v. United States,* 286 F.2d 118 (10th Cir. 1960); see also *United States v. Rose,* 570 F.2d 1358 (9th Cir. 1978) (materially false statement required for 18 U.S.C. § 542). In *United States v. Haas,* 440 F.Supp. 426 (S.D. Ala. 1977), the Court read into the federal obstruction of justice offense knowledge and intent elements and then found the indictment defective because it didn't set forth these elements. If this Court were to hold that materiality is an essential element, the indictment in this case is defective for failure to set it forth. *United States v. McGough,* 510 F.2d 598 (5th Cir. 1975) (indictment which failed to allege materiality in a § 1001 case is defective).

The need to exclude trivial falsehoods cited by the *Beer* court as its reasoning behind reading a materiality requirement into § 1001 cases also applies here. Why should felony status attach where the false or fictitious aspect of a claim is harmless? Furthermore, § 287 arguably has a "knowledge" element but no specific intent element. Hence, it is even more appropriate to exclude insignificant, trivial, unimportant falsehoods since the potential sentence is identical to a § 1001 conviction, which requires proof of specific intent. This is especially true because §§ 287 and 1001 were originally part of the same statute. Without materiality and specific intent requirements one could be found guilty of violating § 287 for understating a claim.

The civil false claims counterpart to § 287 is set forth in 31 U.S.C. § 231 *et. seq.* Section 231 is not the specific statute applicable in a civil proceeding but it is the statute to which general reference is made for civil liability purposes. *See, e.g., United States v. Bornstein,* 423 U.S. 303 (1976) (where subcontractor has caused prime contractor to present false claims, the number of $2,000 forfeitures doesn't

turn on the number of false invoices but on the number of fraudulent acts of the subcontractors); *False Claims Act — Specific Intent*, 26 A.L.R.Fed. 307, 308 n.1 (1976). The all-important reference in § 287 to "knowing such claim to be false, fictitious or fraudulent" also appears in the relevant civil false claims statute. *Id.*

A very narrow construction has been given the *civil* false claims statute because of its similarity to the criminal statute. *United States v. Bornstein*, 423 U.S. 313 n.8 (1976); *United States v. McNinch*, 356, U.S. 595, 598, (1958); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

Nonetheless, *civil* cases were found requiring proof of materiality. See, e.g., *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d at 461; *United States v. Johnston*, 138 F.Supp. 525 (W.D. Okla. 1956) (Government must prove that the claims would not have been paid if the true facts had been known).

Section 287 is a theft-type crime. It concerns stealing from the federal Government by the wrongful use of claims against the Government. As the Court in *Equifax*, 557 F.2d at 460, noted:

> The False Claims Act was not designed to reach every kind of fraud practiced on the Government. *United States v. McNinch*, 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958). The statute is primarily directed against Government contractors' billing for nonexistent or worthless goods or charging exorbitant prices for delivered goods. *Id.*

Hence, materiality would appear to be consistent with the purpose of the statute as set forth in *Equifax*.

Assuming that materiality is an essential element in a § 287 prosecution, the fact that A & S or Robert Adams may not have performed all of the services claimed is not material so long as they were all performed by someone (e.g., the Petitioner). Yet the jury could have returned convictions after deciding that the claims made were false because A & S didn't do all of the work itself despite the fact that all the work was performed and A & S was therefore entitled to reimbursement in full.

Essentially the same rationale as that set forth above applies to requiring "willfulness" as an essential element in §287 prosecutions. In addition, the Circuits have reached different results on this issue as well as on "materiality." *See, e.g., United States v. Milton,* 602 F.2d 231, 233-34 and nn. 6&9 (9th Cir. 1979) (citing civil false claim cases requiring proof of a fraudulent intent, Court held that willfulness — in sense of making a statement known to be untrue when made — required where false claim asserted); *United States v. Maher,* 582 F.2d 842, 845-48 (4th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1978); *Johnson v. United States,* 410 F.2d 38, 47 (8th Cir. 1969), *cert. denied,* 396 U.S. 822 (1969); *contra United States v. Cook,* 586 F.2d 572, 575 (5th Cir. 1979), *cert. denied,* 442 U.S. 909 (1979); *United States v. Precision Medical Lab, Inc.,* 593 F.2d 434, 444 (2nd Cir. 1978).

C. The Evidence Was Insufficient to Support the One § 1001 Conviction That Was Not Overturned.

If this Court grants the within petition and reverses the §287 convictions, it should also overturn the only §1001 conviction not reversed by the Tenth Circuit. A number of the same problems which caused the Tenth Circuit to reverse the balance of the §1001 convictions, and the reasons given for reversal of the §287 convictions, also apply to the §1001 count upheld by the Tenth Circuit. This

count was so inextricably involved with the rest of the counts that reversal is mandated by the nature of the trial court error.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* JAMES A. IRWIN, JR., *Defendant-Appellant.*	No. 78-1904

Before SETH, Chief Judge, HOLLOWAY, MCWILLIAMS, BARRETT, DOYLE, MCKAY, LOGAN and SEYMOUR, Circuit Judges, and BOHANON, District Judge:

ORDER ON REHEARING

On consideration of Defendant-appellant's petition for rehearing with suggestion for rehearing en banc and the Government's response, the panel, Judges Holloway, Doyle and Bohanon, concludes as follows:

Defendant-appellant Irwin's petition for rehearing and rehearing en banc argues that (1) the jury could have convicted defendant on the basis of evidence ruled by this court to be insufficient as a matter of law, thus attacking the affirmance of the false claims convictions on counts 4, 6 and 8; and (2) the opinion appears to be predicated on a theory as to those counts which was not tried or submitted to the jury.

It is true that the opinion concluded, p.32, that the proof was insufficient to show that A&S's bills were false, fictitious or fraudulent because of failure to identify on the bills the work performed by subcontractors. Moreover, the indictment was furnished to the jury with the general allegations concerning false claim counts 4, 6 and 8 that the claims were "false, fictitious and fraudulent in that a substantial part of the work so claimed did not consist of engineering services performed by A & S Consultants, Inc." (I R. 5, 6 and 7-8). Nevertheless, as the opinion stated, p. 32, there was evidence tending to show that the claims submitted by defendant Irwin to A&S, and subsequently submitted by A&S to Delta and the EDA, were false because they purportedly represented the amount due for work not in fact performed by or on behalf of A&S. This theory of the Government that such services were not performed at all or were exaggerated was argued and tried. We must disagree, therefore, with defendant's contention that "[e]ven if a jury could reasonably conclude that services billed had not been performed at all, there was virtually never any government allegation to that effect in the indictment, in pretrial hearings, in the instructions, or in the government's opening statement." (Petition for Rehearing, p.4).

Instead, we note that during the pre-trial hearing on various defense motions the trial court asked the Assistant United States Attorney to explain the Government's theory behind the false claim counts. (II R. 16). After some discussion on other points the trial court had the following colloquy with the Assistant United States Attorney (II R. 19-20):

> THE COURT: The Government didn't get the benefit. That's what you are saying?
>
> MR. NOTTINGHAM: That's right.

THE COURT: The Government's beneficiaries didn't get the benefit?

MR. NOTTINGHAM: That's right.

THE COURT: So, it is as if materials were ordered, billed for and never supplied?

MR. NOTTINGHAM: That's our position, your Honor, and I don't know how I could have made it anymore clear [sic] or any clearer . . . .

Similarly, the same Assistant United States Attorney told the jury in his opening statement that he intended to prove, among other things, that the number of hours which A & S billed to Delta for engineering work performed on the industrial part [*sic*] project "were exaggerated all out of proportion," were "padded," and were "inflated." (IV R. 20-21, 24, 36, 43). He further indicated that some of the services which defendant had supposedly performed had not in fact been done. (*Id.* at 26, 43). In his closing argument to the jury the Assistant United States Attorney again argued that the evidence showed the work supposedly performed by Irwin on the project which was billed to Delta through A&S was "exaggerated" or "wasn't done." (XIII R. 16, 36).

Defense counsel also recognized that the Government had attempted to prove during the trial that A&S's bills to Delta were false because they contained claims for services which had not been performed. This was admitted during argument on the mid-trial and post-trial motions for judgment of acquital. (*See* IX R. 162-64; XV R.7-8,29-30). During the hearing on the post-trial motion for judgment of acquittal, the district court noted: "Of course, it's an issue as to whether there were any services. . . . If you construe the evidence in the light favorable to the Government, there weren't any services." (XV R. 7).

Thus we are satisfied that there was notice of and evidence submitted on the theory that the services were not performed at all or were exaggerated. This manner of proof was not so out of the bounds of the allegations of the indictment as to be impermissible, nor was it a prejudicial variance. We are therefore also convinced that this case does not come within the rule of *Dunn v. United States,* 422 U.S. 100, so that reversal under it is required, as defendant argues.

What we have said also disposes of defendant's further argument under point (1) above. This contention is that since one theory on the false claim counts has been held insufficient as a matter of law, and since it is impossible to determine if the jury relied on that theory, the convictions cannot stand. We feel it unrealistic to predicate this argument on the assumption that the jury relied on the unsupported theory that the A&S bills were false because they failed to itemize and identify the work performed by subcontractors. As spelled out above, the Government argued the position which the evidence did support – that the work was not performed at all or were [*sic*] exaggerated – along with the other theory which was not supported by the proof. (XIII R. 35-37).

Accordingly, the panel concludes that the petition for rehearing should be overruled.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES A. IRWIN, JR.,
Defendant-Appellant.

No. 78-1904

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D.C. No. 78-CR-122)

William Rapson, Denver, Colorado (Robinson, Waters & O'Dorisio, P.C. Denver, Colorado, were on the brief) for Defendant-Appellant

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Before HOLLOWAY AND DOYLE, Circuit Judges, and BOHANON, District Judge*

HOLLOWAY, Circuit Judge

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*The Honorable Luther L. Bohanon, of the Western District of Oklahoma, sitting by designation

This is a direct appeal by the defendant-appellant James A. Irwin, Jr., from his conviction and sentence[1] on each count of an eight-count indictment charging him with conspiracy (Count 1) in violation of 18 U.S.C. §371, the general conspiracy statute, with making a false statement to a United States agency (Count 2) in violation of 18 U.S.C. §§1001[2] and 2, with concealing or covering up material facts (Counts 3, 5, and 7) in violation of 18 U.S.C. §§1001 and 2, and with filing false claims with an agency of the United States (Counts 4, 6, and 8) in violation of 18 U.S.C. §§287 and 2.[3]

Defendant says that the essence of his appeal is that the Government failed to prove "materiality" — it failed to show how his acts might have affected in any significant way the decisions of the Government agency involved, the Economic Development Administration (EDA). Defendant argues that the trial court erred: (1) in denying a motion for judgment of acquittal, the evidence being insufficient to support the charges; (2) in submitting the issue of mate-

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[1] Defendant was sentenced to concurrent terms of three years' imprisonment on each count. On the condition that the defendant would be confined "in a jail type institution" for a period of six months, the district court suspended the execution of the remaining 2½ years of his sentence and placed him on probation upon his release from confinement. (I R.45).

[2] The pertinent portion of 18 U.S.C. §1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[3] 18 U.S.C. §287 provides:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

riality to the jury; (3) in instructing the jury improperly on the issue of materiality; (4) in admitting evidence concerning the eligibility for reimbursement of certain expenses under a federal grant; (5) in failing to instruct the jury on the element of trick, scheme, or device for the nondisclosure counts under §1001; and (6) in failing to dismiss the false claim counts under §287 due to the Government's failure to set forth in the indictment the essential elements of materiality and specific intent.

We set aside the convictions on Counts 1, 3, 5 and 7 and affirm the convictions on Counts 2, 4, 6 and 8 for reasons that follow.

I

The factual background

Viewing all the evidence, together with all reasonable inferences therefrom in the light most favorable to the Government, as we must on this appeal from a guilty verdict, *United States v. Twilligear,* 460 F.2d 79, 80-81 (10th Cir.), the evidence tended to show the following facts.

In 1974 the city of Delta, Colorado, became interested in the development of an industrial park, a project which was being promoted by a local business group called the Delta County Development Co. In February 1974 the Delta city council hired Management Services Company (MSC), a trade name used by defendant, to provide assistance in obtaining federal and state funds to finance the project.[4] Defendant's compensation under this contract was to be based, in part, on a percentage of any Government grant or loan obtained for the city through his efforts.

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[4] Defendant acknowledged at trial that the city council hired him as a grantsman. XI R.124. This job required him to research the various Government programs that might be available to the community, to determine if any funds from these programs might be available for a particular community project, and to do whatever needs to be done to obtain the Government funds. (X R.26).

After being informed by a United States Congressman that the percentage method of compensating defendant for his work was illegal, the city council entered into a second contract with defendant in June 1974. Under it, Delta was obligated to pay the defendant $150 per day for his efforts in attempting to secure federal or state funds for various projects in which Delta became involved. In addition, defendant was to be reimbursed for all reasonable costs related to the preparation of grant and loan applications and for all related travel and entertainment expenses.

Although defendant began to work for Delta under the first contract in February 1974 he apparently did not bill the city for his services and expenses until September 4, 1974. Between Sepetmber 4, 1974 and April 1, 1975, Irwin submitted to Delta three separate bills which purportedly represented the services rendered and the expenses incurred under the two contracts between April 10, 1974, and March 28, 1975. These bills, which totaled approximately $21,000, were paid by Delta out of its own funds.

On October 18, 1974, defendant submitted on behalf of Delta a federal grant application to the Economic Development Administration (EDA) to secure funding for the city's industrial park project. Irwin admitted at trial that he prepared the EDA grant application with some minor help from other individuals and that he was responsible for reviewing the application for its accuracy and completeness. The evidence further indicates that when EDA officials who reviewed the application found it to be incomplete or unclear, it was defendant's responsibility to rectify the problems.

After several meetings with EDA officials in which defendant provided further documentation and clarification of the information contained in the application, EDA finally approved it and made an "offer of grant" on March 19, 1975 which the city of Delta accepted on March 28,

1975. Count 2 of the indictment concerns one page of the grant application which was approved and accepted by EDA.

In August 1974, a few months prior to the time that defendant submitted the grant application to EDA, he met with Robert J. Adams, an unindicted coconspirator, to discuss the engineering needs for Delta's industrial park project. Although Adams and his company, A&S Consultants (A&S), had performed engineering work for the city of Delta since 1967, he did not at the time of his meeting with Irwin have a contract with Delta to be the project engineer for the industrial park project.

During this meeting Adams orally agreed that if he became project engineer for Delta's industrial park project, he would pay Irwin for services primarily related to the preparation of the EDA grant application. Sometime subsequent to this initial meeting Adams became project engineer and agreed to pay Irwin $18,000 for the work he did pursuant to their oral agreement. At the time Irwin told Adams that any payments to Irwin would be eligible costs under the EDA grant.

After EDA had made its grant offer in March 1975, it was quite apparent that some of the services for which Irwin expected payment from Adams were declared by EDA to be ineligible for payment with grant funds. Adams and Irwin still agreed, however, that Irwin would be paid $18,000 for his services despite the fact that some of those services were known to be ineligible for payment with grant funds. Adams testified that it was their intention that any payment to Irwin would be derived from the grant funds.

In May 1975, subsequent to EDA's approval of Delta's grant application, Irwin was appointed by the Delta city council to a salaried position as city manager. In this po-

sition Irwin became a central figure in the disbursement of funds for the industrial park project which was being financed in part by the EDA grant.

As city manager, Irwin was the city's receiving agent for bills and invoices that were submitted for work done on capital projects such as the industrial park. Although the city council had final authority to authorize payment on a bill, Irwin was responsible for the initial screening and review of the incoming bills. By his own testimony, Irwin had the authority to authorize payment on bills prior to the final approval by the city council.

Once the federal grant money became available for disbursement to Delta, Irwin and Adams would send to EDA a monthly itemized list of costs incurred by Delta on the industrial park project which were to be reimbursed under the EDA grant. Each monthly statement to EDA also contained a compilation of the bills received that month and the payments made by Delta. Each bill would be stamped "approved" and would bear the date and initials of both Irwin and Adams.

Between August 1975 and October 1975 Adams submitted to Irwin as Delta's city manager three separate bills on A&S stationery for professional services rendered on Delta's industrial park project. Each A&S bill contained a charge for services allegedly performed by Irwin, although there was no indication of this fact on the bill. These bills were approved by Irwin as city manager and were paid by Delta. In at least one instance, Irwin authorized payment to A&S prior to the final approval of the city council. After each A&S bill was paid by Delta, it was then submitted in a monthly statement to EDA by Irwin and Adams for approval and reimbursement under the grant. These three bills became the basis for Counts 3-8.

Shortly after each payment to A&S by Delta, Adams would give Irwin a check for an amount which corresponded to a particular item on the bill paid by Delta. Defendant ultimately received approximately $18,000 from Adams. Further evidence will be detailed as necessary in discussing Irwin's appellate contentions, to which we now turn.

II

The Count 2 false statement charge

Count 2 charges that defendant violated 18 U.S.C. §§1001 and 2 by willfully and knowingly making or causing to be made a false statement as to material facts in the EDA grant application which he prepared and submitted on behalf of Delta.[5] The indictment specifically alleges that Irwin stated and represented in the EDA grant application that his company, MSC, had "received no compensation for services performed in connection with the application," when in fact he knew that MSC "had received compensation from the City of Delta for these services and expected to receive additional compensation from the City of Delta for these services." (I R.3-4) Defendant contends that the evidence failed to show that a false statement was made or that it was material.

The essential elements which the Government must prove in a false statement prosecution under §1001 are that (1) the defendant made a statement; (2) the statement was false, fictitious or fraudulent as the defendant knew; (3) the statement was made knowingly and willfully; (4) the statement was within the jurisdiction of the federal agency; and (5) the statement was material. *See United States v. Fitzgibbon,* 619 F.2d 874, 879 (10th Cir.); *see*

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[5] The district court submitted the Government's case to the jury under 18 U.S.C. §2 (b).

also United States v. Radetsky, 535 F.2d 556, 571 (10th Cir.), *cert. denied*, 429 U.S. 820; *Gonzales v. United States*, 286 F.2d 118, 120-21 (10th Cir.), *cert. denied*, 365 U.S. 878.

The page of the EDA grant application containing the alleged false statements requires the applicant to list *inter alia* the names of all persons "engaged by or on behalf of the applicant . . . for the purpose of expediting applications made to . . . [EDA] for financial assistance. . . ." In addition the applicant is required to state in separate columns the "total compensation" and the "compensation already paid" to each person listed. In the event that no one is employed for the purpose of expediting the application, then the applicant is required to indicate this fact by putting the word "none" on the form.[6]

Delta's grant application to EDA indicated that MSC had been hired as "planning and administrative consultants." Under the column marked "total compensation" a zero (0) was entered, while the column marked "compensation already paid" was left blank. At trial Irwin testified and explained that the application was prepared in different stages and that MSC had not received any payment from Delta for its services at the time this part of the application was completed. He admits however, that by the time he submitted the grant application to EDA in October 1974, Delta had paid him in part for his work on the application and he expected further payment in the future. *See* Brief of Appellant at 5, 34. On this appeal he argues that he did indicate in the application that MSC was being paid for its services since he listed it as a grant expediter, that leaving the "compensation already paid" column blank is inconsistent with the alleged misrepresentation that MSC

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[6]This information was called for on the EDA application form, *see* Exhibit 20, which the agency was empowered to require under its authority to make regulations. *See* 42 U.S.C. §3211 (12); 13 C.F.R. §309.22 (1980).

received no compensation from Delta for its services, and that the zero in the "total compensation" column concerns past compensation and only demonstrates his confusion since no listing is required where no compensation is to be paid.

We cannot agree that the evidence fails to show that a false statement was made in Delta's grant application to EDA. "Leaving a blank is equivalent to an answer of 'none' or a statement that there are no facts required to be reported." *United States v. McCarthy*, 422 F.2d 160, 162 (2d Cir.), *cert. dismissed*, 398 U.S. 946. If there are facts that should be reported, leaving a blank belies the certification on the front page of the application that information therein is "true and correct." *See also id.* at 162. The testimony and exhibits clearly show that Irwin submitted MSC's first bill to Delta on September 4, 1974 for $9,404.38 for services rendered between April and August of 1974; that Delta issued a check to MSC for this same amount on October 2, 1974; and that Irwin cashed this check on October 4, 1974 — approximately 14 days before he submitted the grant application to EDA on October 18, 1974. We think the jury could find beyond a reasonable doubt that a false statement was made on the grant application concerning the amount of compensation paid by Delta to MSC for expediting the application and that Irwin knowingly and willfully made the false statement or caused it to be made.

Defendant's final contention with regard to Count 2 of the indictment deals with the materiality of the false statement. Not only does he challenge the evidence as being insufficient to show that the false statement was material, but he also claims that the trial court erred in submitting the issue of materiality to the jury and in instructing the jury as to this issue.[7]

[7] This argument is made with respect to each count of the indictment.

The record reflects that Irwin requested and submitted an instruction on the issue of materiality and that the district court gave the defendant's tendered instruction, changing only a few words of it. Defendant does not cite any portion of the record, nor can we find any instance, showing that he made a timely objection to the district court's submission of the materiality issue to the jury. Under these circumstances defendant cannot claim as error that which he invited. *United States v. Riebold*, 557 F.2d 697, 708 (10th Cir.), *cert. denied*, 434 U.S. 860; Rule 30, Fed. R. Crim. P.[6]

The district court instructed the jury, *inter alia*, that (XIII R. 65):

> The making of a false statement or the concealment of the material fact to an agency of the United States Government is not an offense unless the statement made or fact concealed is material.
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> A material statement or fact is one that has a natural tendency or is capable of inducing action by the agency, in this case the . . . [EDA].

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[6] Even if Irwin had raised a timely objection to the district court's action, under our past cases materiality is a factual question for submission to the jury with proper instructions. *See United States v. Radetsky, supra*, 535 F.2d at 571, 582-83 (Barrett, J., dissenting in part); *United States v. Weiss*, 431 F.2d 1402, 1406 & n.3 (10th Cir.); *Gonzales v. United States, supra*, 286 F.2d at 122.

Defendant argues that the majority rule is that materiality is a question of law for the court in prosecutions under §1001, citing *United States v. Haynie*, 568 F.2d 1091 (5th Cir.); *United States v. Beer*, 518 F.2d 168 (5th Cir.); *United States v. Bernard*, 384 F.2d 915 (2d Cir.) and *United States v. Ivey*, 322 F.2d 523 (4th Cir.), *cert. denied*, 375 U.S. 953, and that the trial court erred here in submitting the issue to the jury. We are not persuaded that our procedure is wrong and remain convinced that materiality is a factual question to be submitted to the jury with proper instructions like other essential elements of the offense, unless the court rules, as a matter of law, that no submissible case is made out by the Government on the issue of materiality.

Relying on *United States v. Radetsky, supra,* Irwin objected to this instruction, claiming that the word "payment" should be used in lieu of the word "action" because the latter word was too ambiguous and permitted the jury to base its decision on trivial agency actions. *See* XII R.156-57, 164. On this appeal Irwin argues that the proper test for materiality is whether the statement was capable of inducing "payment" or "of influencing a determination or decision required to be made." Consequently he argues that his conviction must be reversed because the district court's instruction permitted the jury to make a finding of materiality based on some "trivial bureaucratic response" to the statement in the grant application. (Brief of Appellant at 40-41).

In *Gonzales v. United States, supra,* 286 F.2d at 122, we held that the test for materiality is whether the falsification "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *See also United States v. Radetsky, supra,* 535 F.2d at 572 n.17a (court found that a test using the word "action" was "parallel" to the test enuniciated [*sic*] in *Gonzales*); *United States v. East,* 416 F.2d 351, 353 (9th Cir.) (test is "whether the falsification is calculated to induce action or reliance by an agency"). The form of an instruction is a matter committed to the discretion of the trial court and there is no requirement that the court adopt the exact language of a requested instruction, provided that the issues of the case are adequately covered. *United States v. Nolan,* 551 F.2d 266, 274-75 (10th Cir.), *cert. denied,* 434 U.S. 904; *United States v. Hall,* 536 F.2d 313, 330 (10th Cir.), *cert. denied,* 429 U.S. 919; *United States v. Newson,* 531 F.2d 979, 983 (10th Cir.). We are satisfied that the change was not in error and that it was not prejudicial to the defendant to use the word "action" in lieu of "payment."

We also must reject defendant's claim that the Government failed to prove the materiality of the false statement. Shirley Marshall, the senior civil engineer who reviewed Delta's application, testified in depth about the EDA review process for grant applications. Marshall was asked about the effect on EDA of an applicant's acknowledgment that someone had been paid a specific amount of money for expediting the grant application. He replied that an investigation would be conducted, that EDA would want to know who was involved and what was done to expedite the application, and that EDA would determine if any of the fees paid to the expediter were eligible for payment with grant funds. He testified that no investigation would be started if the grant applicant indicated on the application that no fees had been paid to an expediter and that EDA did not care if the grant applicant hired someone to expedite the application, so long as no grant funds were used to pay the expediter for his services. (IX R.105-08; *see also* XII R.82).

We think the evidence amply supports a jury finding that the false statement in Delta's grant application was material and had the capacity to influence EDA's decision to offer Delta financial assistance for its industrial park project. Consequently we uphold the conviction on Count 2.

III

The concealment or covering up charge of Counts 3, 5 and 7

Counts 3, 5 and 7 charge that defendant violated 18 U.S.C. §§1001 and 2 by willfully and knowingly concealing and covering up material facts in a matter within the jurisdiction of EDA. Although each count relates to a specific item on separate A&S bills, each alleges that Irwin concealed the same material facts on the bills, to wit: (1)

that MSC had received or would receive a payment from A&S for services performed on the industrial park project; (2) that MSC had already received payment from Delta for all or part of these services; and (3) that all or part of the money received by MSC from A&S was for services which EDA had previously declared ineligible for payment from Delta's federal assistance grant. Count 7 also charged Irwin with the concealment of a fourth material fact, namely, that MSC did not perform any part of the revision of design on Crawford Avenue. These material facts were allegedly concealed by the trick of billing the sums paid by A&S to MSC on the letterhead bills of A&S as part of the fee for A&S's architectural and engineering services.

Irwin argues, *inter alia*, that the Government failed to prove that there was a duty to disclose in A&S's bills to Delta the facts allegedly concealed. Specifically he points to the lack of evidence showing that any statute, EDA regulation, or form required disclosure of the facts which he now stands convicted of concealing. The Government does not deny that in a §1001 concealment prosecution it must prove that the defendant had a duty to disclose the information which is alleged to have been concealed. Instead it basically contends that §1001 prosecutions are not limited to those statements which are required to be made by law or regulation and that the proof sufficiently shows that Irwin and A&S had a duty to disclose the concealed information.

We agree that §1001 prosecutions are not limited to *statements* which are required to be made by law or regulation. *See, eg., United States v. Fitzgibbon, supra,* 619 F.2d at 878. We think, however, that the Government's argument misses the point since we are dealing not with a false statement, but rather with the concealment or nondisclosure of material facts. *See generally United States v. Diogo,* 320 F.2d 898, 902 (2d Cir.) (proof needed for concealment

prosecution differs significantly from the proof needed for a false statement prosecution). We believe that it was incumbent on the Government to prove that the defendant had the duty to disclose the material facts at the time he was alleged to have concealed them. *See, e.g., United States v. Muntain,* 610 F.2d 964, 971-72 (D.C. Cir.) (HUD form specifically required disclosure of concealed information); *United States v. Ivey, supra,* 322 F.2d at 524-26 (agency regulation required disclosure of concealed information); *see also United States v. Phillips,* 600 F.2d 535,536-37 (5th Cir). And, of course, there can be no criminal conviction for failure to disclose when no duty to disclose is demonstrated. *Cf. Chiarella v. United States,* 445 U.S. 222, 227-28. Further support for this position is found in the district court's instructions to the jury.[9]

We are persuaded that it must be established by the Government that the law required disclosure of the information at the time the defendant allegedly concealed it to sustain such charges. The Government was required to show that there was a legal duty to disclose to EDA the material facts which were allegedly concealed when Irwin caused the payments to him to be billed on the letterhead bills of A&S as part of the fee for A&S's architectural and engineering services on Delta's industrial park project.

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[9]The charge stated in part (XIII R.66-68):

> An act is done willfully if done voluntarily and intentionally and *with specific intent to do something the law forbids;* that is to say with bad purpose, either to disobey or to disregard the law.
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> To cause another person to commit a criminal act, it is necessary that the accused willfully do something which . . . results in the other persons either doing something the law forbids or *failing to do something which the law requires to be done.*
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> Once again, an act, or a failure to act, is willfully done if done voluntarily and intentionally and with specific intent to do something which the law forbids, *or with specific intent to fail to do something which the law requires to be done;* that is to say, again, with bad purpose either to disobey or to disregard the law. (Emphasis added).

The Government attempted to show through the testimony of Shirley Marshall that A&S, as project engineer, was obligated to disclose in its billings to Delta that Irwin and MSC received or would receive a payment from A&S for services performed on the industrial park project. Marshall testified that project engineers frequently subcontract work out to others and that the subcontractors are required to submit invoices for the work performed to enable EDA to review the work and to approve it for reimbursement under the grant. He further indicated that it was customary for the project engineer to disclose in its bills to the grant recipient the names of the subcontractors and the work performed by them.

On cross-examination, however, Marshall admitted that the project engineer does not have to indicate on its bills to the grant recipient the names of every employee or subcontractor who does work on the project. The defense also introduced the testimony of Fred Van Remortel, an ex-EDA official who had been a regional director for the agency. (XII R.51-54). Van Remortel testified that there was nothing wrong with the project engineer subcontracting work out to others and that he was not aware of any EDA regulation or law which required the project engineer to include in its bills the names and time of the subcontractors doing work for it. He further indicated that he was not aware of any law or regulation requiring an individual to disclose or report to the EDA that he is acting both as a grant exediter and as a subcontractor on the same project. There was no contradiction of this testimony of Mr. Van Remortel and we are referred to no such statutes or regulations by the Government.

We must agree that it was not shown that there was a legal duty to disclose in A&S's bills to Delta the payments made by A&S to MSC or the other matters involved. Consequently the convictions on Counts 3, 5 and 7 cannot stand.

IV

The Count 1 conspiracy charge

Count 1 charged defendant with a violation of 18 U.S.C. §371. More specifically, Count 1 charged that between September 1974 and September 1976 Irwin and Adams conspired: (1) to defraud the United States by depriving it of its money and property, by deceiving EDA officials assigned to administer the grant, and "by circumventing, defeating, evading, and frustrating safeguards and processes established by . . . [EDA] for the proper award and sound administration of federal grants"; and (2) to commit offenses against the United States, namely 18 U.S.C. §1001, by using a trick, scheme, and device to falsify, conceal, and cover up material facts in matters within the jurisdiction of EDA.

Irwin argues, *inter alia,* that the conspiracy conviction on Count 1 must be set aside because materiality of nondisclosure alleged in Counts 3, 5 and 7 was not proved, and that those nondisclosures [*sic*] offenses may have been used by the jury to reach the conspiracy verdict by finding defendant guilty under the second part of the charge — conspiracy "to commit offenses against the United States . . . ." He says that his argument on lack of proof of materiality on the §1001 counts (Counts 3, 5 and 7) thus requires reversal of the conspiracy conviction; that materiality with respect to these nondisclosure counts was not shown because the Government failed to demonstrate that there was a duty to disclose the specified facts, and how nondisclosure could affect EDA decisions; and that since it cannot be determined whether the jury may have based the conspiracy conviction on the theory of conspiracy to commit these unproven §1001 offenses, the conspiracy conviction must be set aside, citing *United States v. Radetsky, supra,* 535 F.2d at 573. (Brief of Appellant at 21-22, 24, 37).

We note that defendant did make these objections

by a motion for judgment of acquittal in the trial court, which were also tied in with objections to the instructions. (XII R. 155-56, 158). The argument was made, *inter alia,* that there has been no proof by way of regulation, statute, or contract of any duty to disclose the matters alleged not to have been disclosed in Counts 3, 5 and 7. (*Id.* at 159-60).

For reasons given in Part III, *supra,* we must set aside the convictions on Counts 3, 5 and 7. The Government did not establish a duty to disclose on the A&S bills the details such as that MSC had received or would receive a a payment from A&S for services performed on the industrial park project, etc. Since the Government did not demonstrate a duty to disclose those matters, there could be no criminal violation of §1001 for such nondisclosures alleged in Counts 3, 5 and 7. Likewise, in view of the objections made pointing to the fact that those charges failed as a matter of law, and that it cannot be determined whether the jury based its conspiracy verdict on a conspiracy to commit those very offenses, the conspiracy conviction cannot stand. *See United States v. Radetsky, supra,* 535 F.2d at 573; *United States v. Kavazanjian,* 623 F.2d 730, 739 (1st Cir.); *United States v. Carman,* 577 F.2d 556, 566-68 (9th Cir.); *United States v. Tarnopol,* 561 F.2d, 466, 475 (3d Cir.); *United States v. Dansker,* 537 F.2d 40, 51 (3d Cir.), *cert. denied,* 429 U.S. 1038; *Van Liew v. United States,* 321 F.2d 664, 672 (5th Cir.); *cf. Leary v. United States,* 395 U.S. 6, 31-32; *Stromberg v. California,* 283 U.S. 359, 367-68; *but see United States v. Dixon,* 536 F.2d 1388, 1401-02 (2d Cir.); *Moss v. United States,* 132 F.2d 875, 878 (6th Cir.).

Accordingly the conviction on Count 1 is set aside.

V

The false claim charges of Counts 4, 6 and 8

Counts 4, 6 and 8 charge that defendant violated 18

U.S.C. §§287 and 2 by presenting or causing to be presented to EDA for payment three claims for engineering services performed by A&S in connection with Delta's industrial park project, knowing the claims to be "false, fictitious, and fraudulent in that a substantial part of the work so claimed did not consist of engineering services performed by A&S. . . ." Each count is based on one of three bills that were submitted by A&S to Delta for services performed on the industrial park project.

Irwin argues that each false claim count should have been dismissed by the district court because the indictment failed to set forth the essential elements of specific intent and materiality. Alternatively he claims that his motion for judgment of acquittal should have been granted because the evidence failed to show "how the claims were false, fictitious, or fraudulent and how EDA payment decisions could be potentially affected by the same." (Brief of Appellant at 28-33; 45-46).

A. Sufficiency of the indictment

Defendant argues that the greater weight of authority supports the position that §287 is a specific intent crime requiring an allegation and proof that the defendant acted intentionally or willfully in submitting the false claim to the Government.[10] He relies on cases requiring a finding of specific intent before liability can attach under the civil False Claim Act, 31 U.S.C. §231. Defendant acknowledges that the district court did instruct the jury that the Government had to prove beyond a reasonable doubt that he acted knowingly and willfully. Nevertheless he argues that an

[10] Prior to trial defendant moved to dismiss Counts 4, 6, and 8 due to the failure of the indictment to set forth "a willfulness element." I R.15. In his motion for a judgment of acquittal, Irwin again argued *inter alia* that the §287 counts should be dismissed since they failed to set forth the necessary elements of specific intent and materiality. (XII R.162).

oral instruction cannot cure a defective indictment, particularly where it is given to the jury for use in its deliberations. (Brief of Appellant at 45-46; Reply Brief of Appellant at 11-12).

With respect to materiality, defendant admits that "§287 does not expressly set forth materiality as an essential element" and that "no cases could be found which require such construction." He argues, however, that "this court should read into §287 a materiality requirement" as was "done judicially with respect to the second clause of §1001." This judicial requirement is necessary, he says, to insure the reasonable application of §287 and to exclude trivial falsehoods from its purview.[11] (Brief of Appellant at 28-33).

The Government responds that "willfulness" and "materiality" are not elements of a §287 crime and that consequently there was no need to specifically allege these facts in the indictment. Support for this position is found the Government says, in the fact that Congress specifically included the elements of willfulness and materiality in the statutory language of §1001 while omitting the terms from the language of §287 and from the Congressionally approved Form 10, Fed.R.Crim.P. (Brief of Appellee at 22-23).

It is fundamental that an indictment must contain the elements of the offense charged, that it fairly inform the defendant of the charge against which he must defend, and that it enable him to plead an acquittal or conviction in bar of future prosecution for the same offense. *See, Hamling v. United States,* 418 U.S. 87, 117; *United States v. Radetsky, supra,* 535 F.2d at 562; Rule 7(c), Fed.R.Crim.P. It is generally sufficient that an indictment set forth the offense in the words of the statute, as long as those words

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[11] The district court did not instruct the jury that materiality was one of the elements which the government needed to prove in a §287 prosecution. *See* XIII R.64-65.

of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense. *Hamling, supra,* 418 U.S. at 117; *Mims v. United States,* 332 F.2d 944, 946 (10th Cir.), *cert. denied,* 379 U.S. 888. We think that the indictment in this case, which essentially follows the language of §287, meets this requirement.

It is true, as defendant points out, that 18 U.S.C. §§287 and 1001 were originally part of the same statute and that §1001 expressly requires willfulness. *See generally United States v. Bramblett,* 348 U.S. 503, 504-09. However, like the Fifth Circuit in *United States v. Cook,* 586 F.2d 572, 575 (5th Cir.), *cert. denied,* 442 U.S. 909, we are persuaded that the inclusion of the term "willfully" in §1001 and the omission of the term in §287 suggests a Congressional intent to exclude this state of mind from the essential elements of the latter offense. This construction is fortified by the fact that Congressionally approved Form 10, Fed.R.Crim.P., designed for §287 indictments, omits willfulness as an element of the offense. Although the forms are merely illustrative, *see* Rule 58, Fed.R.Crim.P., we think that Form 10 is "strong evidence of what the criminal law requires." *Honea v. United States,* 344 F.2d 798, 804 (5th Cir.); *see also Myles v. United States,* 170 F.2d 443, 445 (5th Cir.).[12] Accordingly we hold that willfulness is not

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[12] *See also United States v. Cook, supra,* 586 F.2d at 575; *United States v. Anderson,* 447 F.2d 833, 836 (8th Cir.), *cert. denied,* 405 U.S. 918; *Clark v. United States,* 400 F.2d 83, 85 (9th Cir.), *cert. denied,* 393 U.S. 1036; *United States v. Bagdasian,* 291 F.2d 163, 165 (4th Cir.) *cert. denied,* 368 U.S. 834; *Martin v. United States,* 285 F.2d 150, 151 (10th Cir.), *cert. denied,* 365 U.S. 853; *Gadsden v. United States,* 223 F.2d 627, 632 (D.C.Cir.), *cert. denied,* 350 U.S. 949; *Donnelly v. United States,* 185 F.2d 559, 560 (10th Cir.), *cert. denied,* 340 U.S. 949; *Carter v. United States,* 173 F.2d 684, 685 (10th Cir.), *cert. denied,* 337 U.S. 946; *Ochoa v. United States,* 167 F.2d 341, 345 (9th Cir.); *United States v. Bishop,* 38 F.R.D. 317, 319 (D.Mont.); 3 Wright, Federal Practice & Procedure §911 (1969); *but see United States v. Larson,* 152 F.Supp. 360, 361 (D.Alaska).

an essential element of 18 U.S.C. §287 and that the indicitment is not insufficient merely because it fails to allege that the defendant acted willfully. *United States v. Cook, supra,* 586 F.2d at 575; *see also United States v. Precision Medical Lab., Inc.,* 593 F.2d 434, 444 (2d Cir.); *but see United States v. Milton,* 602 F.2d 231, 233-34 & nn.6&9 (9th Cir.) (approving jury instruction on willfulness in §287 prosecution); *United States v. Maher,* 582 F.2d 842, 845-48 (4th Cir.) (approving jury instruction); *cert. denied,* 439 U.S. 1115; *Johnson v. United States,* 410 F.2d 38, 47 (8th Cir.), *cert. denied,* 396 U.S. 822.[13]

For similiar reasons we do not read into §287 a materiality requirement as we did with respect to the second clause of §1001 in *Gonzales v. United States, supra,* 286 F.2d at 120-21. There is no indication in either the statutory language of §287 or its legislative history that Congress intended materiality to be an essential element of a §287 offense. Admittedly there are cases indicating that materiality is an essential element of §287. *See, e.g., United States v. Adler,* 623 F.2d 1287, 1291 n.5 (8th Cir); *United States v. Snider,* 502 F.2d 645, 652 n. 12 (4th Cir.); *United States v. Johnson,* 284 F.Supp. 273, 283 (W.D.Mo.), *aff'd,* 410 F.2d 38, 46-47 (8th Cir.), *cert. denied,* 396 U.S. 822; *see also United States v. Haynie,* 568 F.2d 1091, 1092 (5th Cir.) (per curiam). These cases, however, do not consider the effect of Form 10, Fed.R.Crim.P., on the question. We think that Form 10 is persuasive that an indictment in such form is sufficient. Consequently we hold that materiality is not an essential element of §287 and need not be alleged in an indictment charging a violation of that statute. There-

[13] We note that *Hammert v. United States,* 14 F.2d 827, 828 (8th Cir.), did quote allegations that defendant "knowingly, willfully . . ." etc., presented a false, fictitious and fraudulent claim and held the indictment sufficient, saying it was practically in the language of the statute. However, the necessity of the element of willfulness was not further developed and we do not view the case as holding willfulness to be a required element of the offense.

fore the district court did not err when it refused to dismiss Counts 4, 6 and 8 on this ground.

B. Sufficiency of the evidence

Defendant also argues that the Government failed to establish that the claims were false, fictitious, or fraudulent.[14] It appears that defendant not only challenges the sufficiency of the evidence on this point but also claims there is a variance between the allegations in the indictment and the evidence presented at trial.

Defendant correctly points out that the indictment specifically alleges that the claims submitted by A&S were false, fictitious, and fraudulent because "a substantial part of the work so claimed did not consist of enginering services performed by A&S." He admitted at trial that the services listed on A&S's bills to Delta were not performed entirely by A&S. He says, however, that this fact does not make A&S's bills false, fictitious, or fraudulent because the evidence clearly establishes that the project engineer (A&S) commonly hires other individuals to do parts of the project work and then bills the grant recipient (Delta) for these services without revealing this fact on the bills. He argues that his convictions on the false claim counts must be reversed since there is no proof that A&S's claims are false, fictitious, or fraudulent when they fail to identify specifically the work performed by subcontractors. (Brief of Appellant at 28-30; Reply Brief of Appellant at 6).

The Government contends that the evidence is sufficient to prove each element of the crimes charged. It argues that the three A&S bills presented to EDA by Delta as part of claims for reimbursement under the EDA grant were false, fictitious, and fraudulent "because they purportedly

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[14] Defendant also claims that the government failed to prove how the alleged false aspect of the claims affected EDA payment decisions. Because we have already held that materiality is not an element of a §287 offense, we need not consider this argument.

represented the amount due for work performed entirely by . . . A&S" when in fact some of the work had been performed by MSC or had not been performed at all. (Brief of Appellee at 7, 13-14).

Section 287 prohibits making or presenting a claim to any United States agency, knowing that it is "false, fictitious, or fraudulent." The disjunctive term "or" clearly indicates that making any one of the three types of proscribed claims would subject the claimant to criminal liability. *See United States v. Milton, supra,* 602 F.2d at 233 n.5; *United States v. Maher, supra,* 582 F.2d at 847; *cf. Fleming v. United States,* 336 F.2d 475, 479 (10th Cir.), *cert. denied,* 380 U.S. 907. Thus a claim need not be fraudulent so long as it is false or fictitious.[15]

We must agree with the defendant that the proof is insufficient to establish that A&S's bills were false, fictitious, or fraudulent because of the failure to itemize and identify on the bills the work performed by subcontractors. However, we conclude that there was evidence tending to show that the claims submitted by Irwin to A&S, and subsequently submitted by A&S to Delta and EDA, were false because they purportedly represented the amount due for work which in fact had not been performed by or on behalf of A&S. Consequently we hold that the district court did not err when it denied Irwin's motion for judgment of acquittal on the false claim counts.

Although not specifically stated Irwin appears to argue, as he did at trial, that the convictions on the false claim

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[15] A claim is false or fictitious within the meaning of §287 "if untrue when made, and then known to be untrue by the person making it or causing it to be made." A claim is fraudulent "if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom submitted. "*United States v. Milton, supra,* 602 F.2d at 233 & n.6 quoting 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §28.04 (3d ed. 1977).

counts cannot be upheld since the evidence does not show that the claims were false, fictitious, or fraudulent in the manner alleged in the indictment. (Brief of Appellant at 28-30). As noted above, we have held that the evidence sufficiently establishes that the claims were false because A&S billed for services which were not performed. Admittedly the indictment does not specifically allege that the claims were false in this manner. Nevertheless we think that if any variance exists between the evidence and the allegations in the indictment, it clearly has not affected defendant's substantial rights.

We have consistently held that a variance between the indictment and the proof is fatal only if the defendant could not have anticipated from the allegations in the indictment what the evidence would be at trial or if a conviction based on the indictment would not bar a subsequent prosecution for the same offense. *See, e.g., United States v. Freeman,* 514 F.2d 1184, 1189 (10th Cir.). There is no showing in this record that either of these circumstances exists. Consequently any variance that may exist between the indictment and the proof is not prejudicial to the defendant and therefore may be disregarded. Rule 52(a), Fed. R. Crim. P.

VI

Conclusion

We have examined defendant's remaining contentions, and find they are without merit and require no further discussion. Accordingly, the convictions and sentences on Counts 2, 4, 6, and 8 are affirmed; the convictions and sentences on Counts 1, 3, 5 and 7 are set aside. The cause is remanded for dismissal of Counts 3, 5 and 7 and for a new trial on Count 1.[16]

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[16] At the retrial, the Government can retry the first theory of conspiracy, namely, conspiracy "(1) to defraud the United States . . ." by the various means alleged. It may not, for double jeopardy reasons, retry conspiracy theory "(2) to commit offenses against the United States" as alleged in the indictment, on which theory the Government failed at the first trial. *United States v. Kavazanjian,* 623 F.2d 730, 739 n.20 (1st Cir.); *Government of Virgin Islands v. Richards,* 618 F.2d 242, 244-45 (3d Cir.).

We are mindful that retrial of the first theory alleged in the conspiracy count will involve trial of the charge of conspiracy to circumvent, defeat, etc., safeguards and processes of the EDA and that the defendant argues that such a charge does not constitute a conspiracy offense. We disagree. 18 U.S.C. §371 reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Dennis v. United States,* 384 U.S. 855, 861, quoting *Haas v. Henkel,* 216 U.S. 462, 479.

18 U.S.C. §287 provides:

False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1001 provides:

Statements or entries generally

Whoever, in any matter with the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Opposition

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No. 81-672

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES A. IRWIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for filing false claims against the United States in violation of 18 U.S.C. 287 and 2.

2. Whether the evidence was sufficient to support petitioner's conviction for making a false statement to a United States agency in violation of 18 U.S.C. 1001 and 2.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-25) is reported at 654 F. 2d 671. The order of the court of appeals on rehearing (Pet. App. A-1 to A-4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1981. A petition for rehearing was denied on August 17, 1981. The petition for a writ of certiorari was filed on October 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on each count of an eight-count indictment charging him with conspiracy in violation of 18 U.S.C. 371 (Count 1), making a false statement to a United States agency in violation of 18 U.S.C. 1001 and 2 (Count 2), concealing material facts from a United States agency in violation of 18 U.S.C. 1001 and 2 (Counts 3, 5 and 7), and filing false claims against the United States in violation of 18 U.S.C. 287 and 2 (Counts 4, 6 and 8). Petitioner was sentenced to concurrent terms of three years' imprisonment on each count, with all but six months of the sentence suspended, followed by probation (Pet. App. B-2 n.1). The court of appeals reversed the convictions on Counts 1, 3, 5 and 7 and affirmed on Counts 2, 4, 6 and 8 (*id.* at B-7 to B-25).

1. The evidence at trial, as reflected in the opinion of the court of appeals, showed that in 1974 the city of Delta, Colorado, hired Management Services Company (MSC), a trade name used by petitioner, to aid in obtaining federal and state funds to finance an industrial park project (Pet. App. B-3). Petitioner began to work for Delta as a "grantsman" in February 1974 and submitted his first bill to the city for services on September 4, 1974 (*id.* at B-3 to B-4).[1] The check he received was cashed on October 4, 1974 (*id.* at B-9). On October 18, 1974, petitioner submitted a federal grant application, which he had reviewed for accuracy and completeness, to the Economic Development Administration (EDA) to secure funding for the industrial park (*id.* at

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[1]Between September 4, 1974, and April 1, 1975, petitioner submitted three separate bills to the city, which purportedly represented the services rendered and the expenses he incurred under the contract between April 10, 1974 and March 28, 1975. These bills, which totaled approximately $21,000, were paid by the city from its own funds (Pet. App. B-4).

B-4). On that application petitioner stated that MSC had "received no compensation for services performed in connection with the applications" (*id.* at B-7). This false statement was the basis for Count 2 in the indictment.

In August 1974, before petitioner submitted the application to EDA, he met with Robert J. Adams to discuss engineering needs for the industrial park project (Pet. App. B-5). During this meeting, it was agreed that if Adams became project engineer he would pay petitioner for services relating to preparation of the EDA grant application (*ibid.*). Adams subsequently became project engineer and agreed to pay petitioner $18,000. At the time petitioner told Adams that the payments would be eligible costs under the EDA grant. Subsequently, it became apparent that some of the services for which petitioner expected payment from Adams might be ineligible for payment with grant funds. Despite this, Adams still agreed to pay petitioner the $18,000 (*ibid.*).

In May 1975, petitioner was appointed by the Delta City Council to a salaried position as city manager. In this capacity, petitioner was responsible for reviewing bills submitted for work done on capital projects such as the industrial park (Pet. App. B-5 to B-6).

In order to receive disbursement of the grant money to Delta, petitioner and Adams would send EDA a monthly list of itemized costs incurred by the city. Each monthly statement to EDA also contained a compilation of the bills received and the payments made by Delta. Each bill was stamped "approved" and was initialed by both petitioner and Adams (Pet. App. B-6).

Between August 1975 and October 1975, Adams submitted to petitioner as Delta's city manager three separate bills for professional services rendered on Delta's industrial park project. Each bill contained a charge for petitioner's services,

but nothing on the bill indicated this fact. These bills were approved by petitioner and paid by Delta. Each bill was then submitted in a monthly statement to EDA for approval and reimbursement under the grant (Pet. App. B-6).[2]

Counts 4, 6 and 8 charge that petitioner violated 18 U.S.C. 287 and 2 by presenting to EDA for payment the three bills referred to above for engineering services performed by Adams' firm, knowing the claims to be "false, fictitious, and fraudulent in that a substantial part of the work so claimed did not consist of engineering services performed by [Adams]" (Pet. App. B-17 to B-18). Petitioner admitted that the services listed on the bills were not performed by Adams. He argued at trial, and again on appeal, that this fact did not make the bills false, fictitious, or fraudulent because the project engineer commonly hired outside help to work on the project and billed Delta for the services as if performed by Adams (*id.* at B-22).

Counts 3, 5 and 7 charged that the failure to indicate on these bills that the work had been performed by him constituted concealment of a material fact relevant to a matter within the jurisdiction of a federal agency in violation of 18 U.S.C. 1001 and 2. Petitioner's defense was that there was no legal duty to disclose who the subcontractor was on any of the bills and thus the nondisclosure was not fraudulent.

2. The court of appeals agreed with petitioner that the failure to itemize and identify on the bills the work performed by subcontractors, *i.e.*, the work allegedly performed by petitioner, was insufficient to make them false, fictitious or fraudulent (Pet. App. B-23). The court concluded, however, that the district court did not err in denying

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[2]Shortly after each payment to Adams by Delta, Adams would give petitioner a check for an amount which corresponded to a particular item on the bill paid by Delta. Petitioner ultimately received approximately $18,000 from Adams (Pet. App. B-7).

petitioner's motion for judgment of acquittal on the false claim counts because there was sufficient evidence to show that the bills included payments for work which in fact had not been performed at all. Thus, the payments were a kick-back. The court recognized that the indictment did not specifically allege that the claims were false in this manner, but it considered this discrepancy between proof and charge to be an immaterial variance (*id.* at B-23 to B-24).

The court of appeals also held that the failure to disclose that the services for these bills had been performed by petitioner for work potentially ineligible for payment from grant money was not a concealment of a material fact within the meaning of 18 U.S.C. 1001. The court found that there was no duty to disclose the specific services performed for which the bill was being submitted (Pet. App. B-12 to B-15).[3]

Finally, the court of appeals affirmed the conviction on Count 2 (Pet. App. B-7 to B-12). It found that petitioner clearly had lied on the grant application about receipt of compensation for preparing the application and that the jury properly could find that the misstatement was material in that it caused EDA not to investigate further the nature of petitioner's involvement in the project (*id.* at B-9, B-12).

Petitioner then sought rehearing on his convictions as to Counts 4, 6 and 8, but the court reaffirmed its earlier decision (Pet. App. A-1 to A-4). The court observed that the theory of the case upon which it upheld the false claim convictions (that the bill was for services never performed) was argued by the prosecutor in his opening statement and in his closing argument, and recognized by defense counsel

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[3]The court also reversed petitioner's conviction for conspiracy because it was arguably based on the concealment charge (Pet. App. B-16 to B-17).

in his argument on the mid-trial and post-trial motions for judgment of acquittal (Pet. App. A-2 to A-3).

ARGUMENT

1. For a number of reasons this case comes to the Court in an unusually complicated posture. While we believe the court of appeals erred in several respects, those errors do not affect petitioner's sentence and, for reasons to be explained, do not otherwise warrant this Court's review.

The only aspect of this case that creates no real difficulty for the Court is the conviction on Count 2, the only false statement count not reversed by the court of appeals. The evidence proved that petitioner stated on the EDA application that he had received no compensation for his services in connection with the application. In fact he had been paid several thousand dollars for his work on the grant. The statement was material because the prior receipt of money would have triggered a more extensive investigation by the EDA, which might have led to disapproval of the grant. The jury apparently did not accept petitioner's claim that he thought the statement was true at the time he approved the application. The court of appeals found ample evidence to support the verdict (Pet. App. B-9).

Petitioner offers no real argument to support review of the court of appeals' decision on Count 2. He merely states (Pet. 15) that this count was "so inextricably involved with the rest of the counts that reversal is mandated" here too. But Count 2 is distinct from the other counts because it concerns a false statement on the EDA grant application prepared by petitioner, rather than omissions of fact on the bill submitted by Adams. Petitioner does not suggest why reversal on all of the other counts should affect the validity of his conviction on Count 2, and there is thus no reason for this Court to entertain his request that his conviction on this count also be reversed.

Petitioner was sentenced for that offense concurrently with all the other convictions, each concurrent sentence imposing a term of three years' imprisonment, suspended to six months, followed by probation. Thus, regardless of the validity of petitioner's convictions on any of the other counts, petitioner still must serve the same sentence. This is thus an appropriate occasion for the Court as an exercise of discretion under the concurrent sentence doctrine to decline to review the issues raised by petitioner with regard to the other convictions. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969).

2. Petitioner contends (Pet. 7-11) that the court of appeals erred in upholding his convictions on the three false claim counts on the basis of a theory of criminal liability that was neither charged in the indictment nor presented to the jury in the trial court's instructions. Petitioner appears to be correct in that assertion. See *Dunn* v. *United States*, 442 U.S. 100 (1979). The court of appeals apparently thought it sufficient that the theory of liability upon which it upheld petitioner's convictions on the false claim counts was argued to the jury by counsel. But the arguments of counsel clearly could not subsitute for an instruction by the trial court requiring the jury to render a verdict on the theory that Adams billed for services not performed at all. *Dunn* v. *United States, supra; Chiarella* v. *United States*, 445 U.S. 222 (1980).

Typically, we would regard this type of error as sufficient to warrant reversal by this Court, but in this case, this action is not appropriate because the court of appeals made other errors that would make reversal of these counts a complete windfall for petitioner. The court clearly erred in overturning petitioner's convictions on Counts 3, 5 and 7, and may have erred in rejecting the theory on which his convictions

on Counts 4, 6 and 8 were obtained, as well as on the theory on which those convictions were sustained.

With regard to the Section 1001 counts, the court imposed a requirement that the government prove that there was a legal duty to disclose that petitioner was the subcontractor for whom these bills were being submitted (Pet. App. B-14 to B-15). Since nothing in the statute or regulations required this disclosure and the agency typically did not inquire into the contractor-subcontractor relationship, the court held that the government had failed to prove this element of the offense.

We believe that the court's analysis is wrong. First, the statute is not limited to disclosure of information that is specifically required by statute or regulation. *Neely* v. *United States*, 300 F. 2d 67 (9th Cir.), cert. denied, 369 U.S. 864 (1962); *Cohen* v. *United States*, 201 F. 2d 386 (9th Cir.), cert. denied, 345 U.S. 951 (1953). The suggestion by the court of appeals that a different rule should apply when the alleged offense is making a false statement, as opposed to failure to disclose information, is unsupported by any case authority. The case relied upon by the Tenth Circuit for this proposition, *United States* v. *Diogo*, 320 F. 2d 898, 902 (2d Cir. 1963), merely states that concealment in violation of Section 1001 requires only "proof of willful nondisclosure by means of a 'trick, scheme or device' " of a material fact.

As the jury found, the evidence clearly supports all the necessary elements of a Section 1001 conviction. The EDA official involved testified that grantsmen generally should not be paid out of grant money, which petitioner knew, and that disclosure of the relationship between petitioner and Adams would have triggered an investigation (Tr. 54-56). Use of the engineering firm's billing system, which the EDA did not typically investigate, was a perfect scheme for obtaining money for petitioner without having to disclose

his relationship with Adams. Nothing more is required for a conviction under Section 1001. Thus, petitioner received unwarranted relief by the reversals of his convictions on Counts 3, 5 and 7.

The proper approach to Counts 4, 6 and 8 is less clear. The government's theory of the case was that the inclusion of the expenses in a bill submitted by an engineering firm for non-engineering expenses constituted a "false claim" within the meaning of 18 U.S.C. 287. Although we think the misrepresentations contained in the bills probably were false statements in violation of Section 1001, and that the jury could have found them to be so, we are not certain that they constituted a false claim against the government in violation of Section 287. Although there is evidence of a kickback, the government did not pursue that theory at trial. Without evidence that these expenses were never incurred or were exaggerated or were clearly ineligible for reimbursement, none of which the jury was requested to find, it is difficult to characterize the bill as a "false claim." In sum, the government probably proved that petitioner's use of Adams' billing scheme was not only an omission of a material fact, but also a false statement to the government, both in violation of Section 1001. This, of course, would raise an additional issue of variance between the indictment and the proof at trial. See *Kercher* v. *United States*, 409 F. 2d 814, 818 (8th Cir. 1969) (Blackmun, J.).

In our view, petitioner was properly convicted on at least four counts in the indictment. The court of appeals upheld his convictions on four counts, but they are just not the four that were properly proved at the trial. We submit that this possible mistake is not one that the Court should expend its limited resources attempting to evaluate. Regardless of how Counts 3-8 should have been resolved, the conviction on Count 2 was clearly proper in all respects and presents no

issue for review by the Court. Since the sentence for Count 2 is equal to and concurrent with those for the other counts, no useful purpose would be served by undertaking review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1981

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